(7) (5)

Nos. 94-923, 94-924

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,
Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

JAMES ARTHUR POPE, *et al.*,
Plaintiff-Intervenors Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

BRIEF OF APPELLANTS SHAW, *ET AL.*, ON THE MERITS

Robinson O. Everett
Counsel of Record for Plaintiff-Appellants
301 West Main Street, Suite 300
Durham NC 27701
(919) 682-5691

42 pp

QUESTIONS PRESENTED

I

Was North Carolina's racially gerrymandered redistricting plan enacted without a compelling state interest for doing so?

II

Did the General Assembly enact North Carolina's racially gerrymandered redistricting plan without narrowly tailoring it?

III

Did the court below negate the "strict scrutiny" test by misallocating the burden of persuasion, relying on post hoc rationalizations, and making clearly erroneous findings of fact?

THE PARTIES

Plaintiff-Appellants are:
RUTH O. SHAW, MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY BULLOCK.

Plaintiff-Intervenors are:
JAMES ARTHUR "ART" POPE, BETTY S. JUSTICE, DORIS LAIL, JOYCE LAWING, NAT SWANSON, RICK WOODRUFF, J. RALPH HIXON, AUDREY McBANE, SIM A. DELAPP, JR., RICHARD S. SAHLIE, and JACK HAWKE, Individually.

Defendant-Appellees are:
JAMES M. HUNT, JR., in his official capacity as Governor of the State of North Carolina; DENNIS A. WICKER, in his official capacity as Lieutenant governor of the State of North Carolina, and President of the Senate; DANIEL T. BLUE, JR., in his official capacity as Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, in his official capacity of Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, an official agency of the State of North Carolina; EDWARD J. HIGH, in his official capacity as Chairman of the North Carolina State Board of Elections; JEAN H. NELSON, in her official capacity as a member of the North Carolina State Board of Elections; LARRY LEAKE, in his official capacity as a member of the North Carolina State Board of Elections; DOROTHY PRESSER, in her official capacity as a member of the North Carolina State Board of Elections; and JUNE K. YOUNGBLOOD, in her official capacity as a member of the North Carolina State Board of Elections.

Defendant-Intervenor Appellees are:
RALPH GINGLES, VIRGINIA NEWELL, GEORGE SIMKINS, N.A. SMITH, RON LEEPER, ALFRED SMALLWOOD, DR. OSCAR BLANKS, REVEREND DAVID MOORE, ROBERT L. DAVIS, C.R. WARD, JERRY B. ADAMS, JAN VALDER, BERNARD OFFERMAN, JENNIFER McGOVERN, CHARLES LAMBETH, ELLEN EMERSON, LAVONIA ALLISON, GEORGE KNIGHT, LETO COPELEY, WOODY CONNETTE, ROBERTA WADDLE, and WILLIAM M. HODGES.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

No. 94-923

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RUTH O. SHAW, *et al.*,
Appellants,
v.
JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Defendant-Appellees.

On Appeal From The United States District Court
For The Eastern District of North Carolina

BRIEF OF APPELLANTS SHAW, *ET AL.*, ON THE MERITS

OPINIONS BELOW

Upon remand from this Court, the three-judge district court rendered majority and minority opinions which, as amended on August 22, 1994, are reported at 861 F.Supp. 408 (E.D.N.C. 1994) and are also reported in the Appendix to the Jurisdictional Statements (hereinafter "App. J.S.") at pp. 6a-154a.[1]

---

[1]The Joint Appendix is cited as J.A.

JURISDICTION

The district court entered judgment against Appellants on August 1, 1994, and at the same time a majority opinion was filed, as well as the dissenting opinion of Chief Judge Voorhees. On August 15, 1994, Plaintiff-appellants filed a Motion to Amend and Add Findings Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. On August 22, 1994, amended opinions were filed by the majority and the dissenting judge in the district court. App. J.S. 6a-154a. On August 29, 1994, Plaintiff-appellants filed a Notice of Appeal. App. J.S. 157a. On September 1, 1994, the district court denied Plaintiffs' 52(b) Motion by divided vote. App. J.S. 155a-156a; and on September 15, 1994, the Plaintiff-appellants filed a Supplemental Notice of Appeal. App. J.S. 159a. Subsequently, pursuant to Rule 22 of the Rules of the Supreme Court, the Plaintiffs and Plaintiff-intervenors filed a Motion Applying For The Determination that the time for docketing the appeals in this case, together with the consolidated single appendix to the jurisdictional statements of Plaintiffs and Plaintiff-intervenors, run to and include November 21, 1994. This Motion was granted by the Chief Justice. Thereafter the Jurisdictional Statements of the Plaintiffs and Plaintiff-intervenors were duly filed on November 21, 1994. Probable jurisdiction was noted on June 29, 1995, 115 S.Ct. 2639. This Court's jurisdiction is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution which provides, "No State shall...deny to any

person within its jurisdiction the equal protection of the laws."

This appeal also involves Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and § 1973c. The text of these statutes is set forth in the Appendix to the Jurisdictional Statement of Plaintiff-appellants.

STATEMENT OF THE CASE

A. Proceedings Below

On March 28, 1992, Plaintiff-appellants filed their action against both State and Federal officials to challenge the North Carolina congressional redistricting plan that had been enacted by the General Assembly on January 25, 1992, after an earlier plan had been denied preclearance by the Attorney General pursuant to § 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c. They claimed that the plan is an unconstitutional racial gerrymander which violates the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and other Constitutional provisions. In their complaint, the Plaintiff-appellants -- who are five white residents of Durham County, North Carolina, registered to vote in that county -- alleged that the General Assembly decided to "create two congressional districts in which a majority of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions,...with the purpose... to create congressional districts along racial lines, and to assure that black members of Congress would be elected from two congressional districts in which a majority of black voters were intentionally and purposefully

concentrated on the basis of census data reflecting the racial composition of North Carolina's population."

The three-judge district court dismissed the action as to all the Defendants, with Chief Judge Voorhees dissenting as to the dismissal of the State Defendants. In turn, the Plaintiff-appellants appealed to this Court, which on December 7, 1992 noted probable jurisdiction and subsequently heard oral argument on April 20, 1993. At that time counsel for the State-appellee began his argument in this manner:[2]

> This case is about the legal significance of two facts. First, the North Carolina General Assembly intentionally created two majority-minority congressional districts. Second, the General Assembly did so for the purpose of complying with § 5 of the Voting Rights Act and of securing preclearance of its congressional reapportionment plan from the Attorney General of the United States.

On June 28, 1993, this Court decided that Plaintiff-appellants had stated a claim under the Equal Protection Clause by alleging that the General Assembly had adopted a redistricting plan "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the

[2]1993 WL 751836 (Oral Argument at page 26). Subsequently, in responding to a question from the Court, counsel stated: "There's no dispute here over what the State's purpose is. There's a dispute over how to characterize it legally, but we're not in disagreement over what the State legislature was trying to do." *Id.* at 38.

separation lacks sufficient justification." *Shaw v. Reno* (hereinafter *Shaw*), ___ U. S. __, 113 S. Ct. 2816, 2832 (1993).[3] In reversing and remanding, the Court ruled that if the Plaintiffs' "allegation of racial gerrymandering remains uncontradicted," the trial court "further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." 113 S. Ct. at 2832.

Upon remand -- and despite the position taken by the State during the oral argument before this Court -- the Defendant-appellees denied that the redistricting plan was a "racial gerrymander" subject to strict scrutiny. Alternatively, they asserted that even if subject to strict scrutiny, the plan complied with the Equal Protection Clause because it was "narrowly tailored" to further the State's "compelling interests." According to the answer, the "compelling interests" were obtaining preclearance under § 5 of the Voting Rights Act, avoiding a violation of § 2, and eradicating the effects of past racial discrimination.

After the answer was filed, the district court allowed 22 persons to intervene as defendants in support of the plan and then permitted 11 persons to intervene on Plaintiffs' side. After some four months of discovery, and denial of a motion by Plaintiffs and Plaintiff-intervenors for injunctive relief, the court proceeded to trial on March 28, 1994. After a six-day trial and the consideration of

[3]This Court affirmed dismissal of the claims against the two Federal Defendants and expressed no view as to the Plaintiffs' claims against the State Defendants under Art. I § 2; Art. I § 4; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Fifteenth Amendment. 113 S. Ct. at 2832.

extensive oral and documentary evidence the court finally rendered its judgment, from which Plaintiffs and Plaintiff-intervenors appealed. The opinions rendered by the majority and by the dissenting judge are discussed hereinafter in the argument.

B. Statement of Facts

As a result of the 1990 Census, North Carolina became entitled to an additional representative in the Congress. In each House of the General Assembly, a committee was entrusted with the task of preparing a redistricting plan for electing members of Congress, as well as reapportionment plans for the legislature itself. These committees conducted many public hearings and, on April 17, 1991, adopted these five redistricting criteria for seats in Congress: (1) equal population; (2) compliance with the Voting Rights Act and the Fourteenth and Fifteenth Amendments; (3) single-member districts consisting of contiguous territory; (4) retaining the integrity of precincts; and (5) not dividing census blocks. J.A. 49-50. Neither "compactness" nor "community of interest" was prescribed as a standard for redistricting.[4]

In July 1991, the North Carolina General Assembly enacted a redistricting plan which included one district, the First, in which African-Americans were a majority of the population, the voting age population, and the registered voters. 1991 N.C. Sess. Laws, Ch. 601. This "majority-minority district" was located in the northeastern

[4]Although the software available to the General Assembly had a program to measure "compactness," it was never used in the redistricting process. Newkirk Dep. at 22-24; Cohen Tr. 588-89.

part of the state, and it also extended further west to include concentrations of African-Americans in Durham.[5] This redistricting plan -- which received the favorable vote of all the black legislators, Stip. 56-60; J.A. 53 -- was transmitted to the Department of Justice for preclearance.

Subsequently, the Democratic leadership of the General Assembly submitted to the Department of Justice a memorandum dated October 14, 1991, which detailed the virtues of the enacted plan and the disadvantages of other proposed plans. Stip. Ex. 25; J.A. 94-138. One such disadvantage was the lack of "compactness" in alternative plans and the resulting barrier to fair representation. *See* e.g. *Id.* at 34, 66; J.A. 109, 129. Among the members of the Democratic leadership in whose behalf the memorandum was submitted were two African-Americans. One was Dan Blue, who was Speaker of the North Carolina House of Representatives and, indeed, only the fourth black who had held such a position in this country since the Civil War. The other was Milton F. "Toby" Fitch, Jr., a Co-chair of the House Redistricting Committee.

On December 17, 1991, Speaker Blue and Representative Fitch were part of a small group invited to meet in Washington with John Dunne, Assistant Attorney

[5]The court below used the term "majority-minority district" to refer to an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority. App. J.S. 8a, n. 3; 861 F. Supp. 408, 417, n. 3. In that usage, the term would not include a district in which African-Americans constituted only a plurality; such a district could be created in the southeastern part of North Carolina by including the large concentration of Native-Americans in Robeson County.

General for the Civil Rights Division.[6] Senator Dennis Winner, the Chairman of the Senate Redistricting Committee, was present; and he later described the meeting to his fellow senators in this manner:[7]

> And I could not figure out why they called us up there and don't understand that to this day. And Mr. Dunne, some of the staff asked a question or two or said -- made an occasional comment, Mr. Dunne did most of the talking. The essence of what he said at that meeting was -- and he said this in different ways over, and over, and over again -- you have twenty-two percent black people in this State, you must have as close to twenty-two percent black Congressmen,

[6]Assistant Attorney General John Dunne, one of the two federal officials who was dismissed as a defendant in this case, could not be deposed by Plaintiff-appellants because of claimed "deliberative process" privilege. However, his deposition in *Miller v. Johnson* (hereinafter *Miller*), 115 S.Ct. 2475 (1995) apparently indicated that he was a significant participant in the events giving rise to that litigation.

[7]See Daily Proceedings in the Senate Chamber for Friday, January 24, 1992, p.. 4; J.A. 281. At his pretrial deposition, Senator Winner waived his "legislative privilege" and testified that, at the Washington meeting on December 17, 1991, Assistant Attorney General John Dunne had told him and other representatives of the General Assembly that "we ought to have a quota system with respect to minority seats. You had 22 percent blacks in this state. Therefore, you ought to have as close to that as you could have of congressional districts." "That is really all I remember about it. . . I think his substance was really that you had -- if you had 22 percent blacks in North Carolina that you ought to have 22 percent minority congressional seats. Whatever shape didn't matter." Winner Dep. Jan 11, 1994, at 6, 10, 17-19.

> or black congressional districts in this State. Quotas.

On December 18, 1991 -- the day after the Washington meeting -- the Department of Justice denied preclearance of the congressional redistricting plan, as well as of the plan for reapportioning the North Carolina Senate and House. J.A. 147-54. The Attorney General's view, as stated in the objection letter, was that the General Assembly could have created a second majority-minority district in the southcentral to southeastern part of North Carolina, but failed to do so "for pretextual reasons." J.A. 153. Instead of challenging the Attorney General's objection by filing a declaratory judgment action in the United States District Court for the District of Columbia, the General Assembly decided to revise its redistricting plan to create two majority-black districts.

This task was not easy because in North Carolina, the voting age population is approximately 78% white, 20% black, 1% Native American, and the remaining 1% predominantly Asian. *See Shaw* 113 S.Ct. at 2820. Moreover, the black population is relatively dispersed, for blacks constitute a majority of the population in only five of the State's 100 counties. *Id.* Nonetheless, with the aid of computer technology, Gerry Cohen, Director of the Bill Drafting Division of the General Assembly, was able to devise a redistricting plan that satisfied the requirements of the Democratic majority leadership. App. J.S. 81a, n. 53; 861 F.Supp. at 458, n. 53.

The computer system used by Cohen and the General Assembly to prepare the redistricting plan was comprised of the 1990 census data at the census block level with respect to total population, voting age

population, population by race or national origin, and housing density. Moreover, as of November 1990, voter registration data by race and party was also merged into the system's database. Stips. 24, 25, 28, 32, 71; Tr. 531. However, the system contained in its database no demographic information as to income, education, type of employment, health care data, commuter patterns or any other type of economic, sociological or historical data. J.A. 48. Indeed, even though during the 1990 census the Census Bureau compiled other socioeconomic information besides population, age, race, and housing density, none of this information became available to the General Assembly until January 1993 -- a year after the second redistricting plan was adopted. Stip. 34.

The computer system used by the General Assembly in its 1991 and 1992 redistricting efforts permitted the operator to display on the computer screen geographic features, including basic map features, highways, streets, rivers, railroads, and political boundaries, and at the same time to display on the screen a report on the population, voting age population, and breakdown by race of the persons within a district or area then being displayed on the screen. Stips. 30, 34; Tr. 531; Newkirk Dep. at 11-12. Thus, by means of software used in conjunction with the computer system, the operator could create and display on the computer screen various combinations of the 229,000 census blocks into which North Carolina is divided and at the same time display a report on the population, voting age population, and distribution of those populations by race for each combination of census blocks. Tr. 540, 547.[8]

---

[8]*See* Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 746-48 (1995).

The map that was before the Court during the argument on April 20, 1993 portrays far better than any words the redistricting plan that resulted from the race-based manipulation of the General Assembly's computer. Nevertheless, this language from the majority opinion in *Shaw* is helpful in understanding the monstrosity that was created:

> The first of two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test," *Shaw v. Barr*, 808 F.Supp. 461, 476 (EDNC 1992) (Voorhees, C. J. , concurring in part and dissenting in part), and a "bug splattered on a windshield," Wall Street Journal, Feb. 4, 1992, p A14.
>
> The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." *Shaw v. Barr*, supra, at 476-77 (Voorhees, C. J., concurring in part and dissenting in part). Northbound and southbound drivers on I-85 sometimes find themselves in

> separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. . .

113 S.Ct. at 2820-21.

Among the remarkable features of the North Carolina plan are these: (1) The serpentine, majority-black Twelfth Congressional District is the least geographically compact district in the United States; (2) the Twelfth District, and the majority-black First District, as well as two other districts, are among the 28 least geographically compact districts in the United States[9]; and (3) the plan's application of the concept of "contiguity" is "a drastic departure from previous redistricting practice."[10]

---

[9]O'Rourke testimony Tr. 217; O'Rourke *supra* n. 8, at 761; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH L. REV. 483, 554-65 (1993). Although three different standards of geographical compactness are generally recognized, the North Carolina districts are among the least geographically compact by any of these standards. *Id.*

[10]*See* O'Rourke *supra* n. 8, at 723, 758-60. In some instances, only "point contiguity" exists -- that is, portions of a district are interconnected only at an imaginary point. Moreover, the plan has at least four "double crossovers": Two districts have "point contiguity" at the same point. For example, no one can go from the northern to the southern portion of the First District without crossing the Third District, or from the eastern to the western portion of the Third

To achieve the plan's overriding purpose of creating two majority-black districts and assuring that two African-Americans would be elected to Congress,[11] some heavy concentrations of blacks in the major cities of the Twelfth District were "tied together with corridors with a requisite number of whites to meet the one-person, one-vote standard." Tr. 614 (Cohen Test.). Indeed, even though the announced criteria for redistricting called for retaining the integrity of precincts and for not dividing census blocks, Stip. 43, various predominantly white census blocks and precincts were split; but the majority-black precincts and census blocks were not split.[12]

District without crossing the First District. Cohen Dep. of November 23, 1993, 63-67; Tr. 212, 276-77; O'Rourke *supra* n. 8 at 723, 758-60. Contrary to the district court's view that these "double crossovers" meet requirements of "technical contiguity", Professor O'Rourke and other experts maintain that, under such circumstances, the districts involved "are simply not contiguous". *Id.* In that event, the General Assembly disregarded its own announced third redistricting criteria. Of course, from the language of the Statute, which enacted the second redistricting plan, it is virtually impossible to determine the location of any district boundaries -- much less the "contiguity" of a district. *See* 1991 N.C. Extra Sess. Laws Chapter 7, enacted January 24, 1992, which rewrote N.C.G.S. §163-201. App. J.S. 169a-240a.

[11]This purpose was alleged by Plaintiff-appellants in their Complaint, conceded by Defendants, and found by the district court *see* App. J.S. 7a, 108a, 110a. The supporting evidence is overwhelming (Tr. 111, 640, 1028, 1037, 1041, 1046-48). Moreover, this race-based purpose is not disputed by even Gerry Cohen, (Tr. p. 640) -- who operated the computer to prepare the plan and in whose testimony the district court placed great confidence. App. J.S. 81a, n. 53; 861 F. Supp. at 458, n. 53.

[12]Tr. 94-100, 106-07, 189-90 (Hofeller Test.); 496, 613-14 (Cohen Test.). At least one precinct was divided among three congressional districts -- which caused confusion among both election

Furthermore, in creating the two majority-black districts, the boundaries of Metropolitan Statistical Areas (MSA's) -- as defined by the Census Bureau -- were also ignored.[13]

The redistricting plan's reliance on "white corridors" to connect concentrations of African-Americans produced such results as these: (1) of Cumberland County's 274,556 residents, those included in the First District are primarily located in Fayetteville, and of that city's 75,928 population, 20,337 African-Americans and 5,940 whites are in the First District. Stip. 114, Exs. 1 & 7; Tr. 610-11 (Cohen Test.); (2) of Greenville's approximately 45,000 residents, 13,197 African-Americans, and 5,082 whites were placed in the First District. Tr. 611 (Cohen Test.); (3) of New Hanover County's population of 120,284, those included in the First District are for the most part residents of the seaport city of Wilmington; and of these city residents 15,369 are African-Americans and 4,660 are white. Stips. 101,102; Tr. pp. 605-08; and (4) in order to offset the removal of some black precincts in Winston-Salem which initially had been intended for inclusion in the Twelfth District, some concentrations of

officials and voters when the 1992 election took place. Pl. Ex. 104 (Stradley Affidavit).

[13]The majority-black Twelfth District splits three MSA's -- namely, Raleigh-Durham (the Research Triangle), Greensboro-High Point-Winston-Salem (the Triad), and Charlotte. Tr. 221-25. Both majority-black districts cross the boundaries of several television markets and newspaper circulation areas. As Chief Judge Voorhees pointed out, these circumstances "make fair representation impossible." *See* 861 F.Supp. at 493. If the majority in the district court was correct in disregarding such circumstances, *Id.* at 472, then geographical districts serve no function. *See* O'Rourke, *supra* n. 8 at 767-70.

African-Americans in the city of Gastonia were added to the Twelfth District by a narrow corridor connecting these "replacement" precincts to concentrations of African-Americans in Charlotte. Tr. 977. A disturbing aspect of the "bizarre" boundaries of North Carolina's two majority-black districts is that they not only reflect the General Assembly's overriding purpose to assure the election of African-Americans to Congress, but also a supplementary purpose to facilitate the election of *particular* black candidates to Congress.[14]

SUMMARY OF THE ARGUMENT

When the Court first considered this case more than two years ago, the State contended that the General Assembly had intentionally created two majority-black districts but was justified in doing so because this was necessary in order to obtain preclearance under § 5 of the Voting Rights Act. However, after the Court reversed the

[14]Thus, in creating the two majority-black districts, Gerry Cohen moved Vance County from another district to the First District in order to help the chances of Eva Clayton, who was then an announced African-American candidate for Congress. Tr. 590 (Cohen Test.). The boundaries of the sprawling First District were drawn in a way that would permit Toby Fitch and Thomas Hardaway, two African-American members of the General Assembly, to run for Congress from that district in the future. Tr. 591-92. Moreover, as Congressman Watt conceded, the substitution of black population concentrations in nearby Gastonia for some black precincts in Winston-Salem had the effect of enhancing the chances of an African-American candidate -- such as Congressman Watt -- from the Charlotte area. Tr. 977 (Watt Test.). Obviously, distrust of race-based redistricting is heightened when it appears that the candidacy of particular individuals has been specially favored by those preparing the redistricting plan. This favoritism for specific African-American candidates makes even clearer that the State's claims of "compelling interest" and "narrow tailoring" are far-fetched.

district court's dismissal of Plaintiff-appellants' action against the State defendants, the State took the position at trial that North Carolina's redistricting plan was not a racial gerrymander and that, in any event, it was justified by the State's "compelling interest" in complying with § 5 and § 2 of the Voting Rights Act and with remedying the effects of unconstitutional past racial discrimination.

On the basis of a concession by the State, the district court unanimously concluded that the State's plan was a "racial gerrymander." App. J.S. 110a, Conclusion 4; 861 F.Supp. at 473-74, Conclusion 4. This conclusion, as to which Appellees took no cross-appeal, should be binding on them. In any event, it is supported by overwhelming evidence -- including maps showing the "bizarre" appearance of the State's congressional districts, the legislative history of the plan, and testimony about the plan's extraordinary disregard of customary and traditional districting practices.

By divided vote, the district court ruled that the State had adequately established a "compelling interest" in enacting a race-based redistricting plan in order to comply with § 5 of the Voting Rights Act. In light of the remarkable similarity between the events that led to enactment of North Carolina's redistricting plan and the events that preceded enactment of the Georgia plan, *Miller* precludes the Appellees from relying now on a claimed interest of the General Assembly in complying with § 5.

Since the district court found that the redistricting plan would not have been enacted "independent of the perceived compulsion of the Voting Rights Act," the only "compelling interest" that remains for Appellees to invoke

is the alleged perceived need to comply with § 2. App. J.S. 108a. This "interest" -- an after-thought by the State following the Court's decision in *Shaw* -- is contrary to the legislative history of the North Carolina redistricting plan, has no support in the record, and is clearly a post hoc rationalization. Since this purpose now being asserted by the Appellees "could not have been a goal of the legislation," it must be disregarded. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n. 16 (1975).

The district court's ruling that the North Carolina redistricting plan is "narrowly tailored" within the meaning of the strict scrutiny test is inconsistent with its finding that (a) the two majority-black districts are "highly irregular in their shapes and extreme in their lack of geographical compactness as compared to other districts of the plan or to other districts nationally," and (b) these "are not the two most geographically compact majority-minority districts that could have been created were no factors other than equal population requirements and effective minority-race voting majorities considered." App. J.S. 108a-109a; 861 F.Supp. at 473. The "rational districting principles" by which the majority in the district court sought to establish "narrow tailoring" also are unconvincing post hoc rationalizations, which reflect that court's faulty methodology.

Although this methodology had numerous defects, three are salient. First, the district court misallocated to Plaintiff-appellants the burden of persuasion as to "compelling interest" and "narrow tailoring." Instead, once racial gerrymandering had been established, the burden of producing evidence and the burden of persuasion should both have rested on the Appellees. Secondly, in defiance of the redistricting plan's legislative history -- which

revealed what the General Assembly did and why -- the district court relied uncritically on a fictitious legislative intent predicated in large part upon information *unavailable* to the General Assembly in January 1992 when the plan was adopted. Finally, for the majority in the district court the premise apparently was that the end justifies the means and that therefore the plan should be upheld so long as it resulted in electing two African-Americans to Congress. Thus, evils of past racial segregation were to be "remedied" by racially segregating voters in different congressional districts.

ARGUMENT

I. The Trial Court Clearly Erred in Ruling That North Carolina's Racially Gerrymandered Plan Furthered any "Compelling State Interest."

A. The "Bizarre" Redistricting Plan Was a Flagrant Racial Gerrymander Requiring "Strict Scrutiny."

In *Shaw*, the Court held that racial gerrymanders must be treated like other race-based classifications and that, accordingly, their racial purpose triggers strict scrutiny. *Miller* reaffirmed this holding, and also made clear that, although the "bizarre appearance" of a redistricting plan may be persuasive evidence of a racial gerrymander, a plan that is not "bizarre" in appearance may still be a racial gerrymander. Both the appearance of the North Carolina plan[15] and its unparalleled flouting of

[15]In *Shaw* the majority observed, "It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." 113 S.Ct. at 2824.

traditional districting principles -- such as contiguity and geographical compactness -- reveal unmistakenly the "overriding" race-based purpose of the General Assembly.[16] Furthermore, the plan's legislative history --

[16]In *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977) the test applied by the Court was whether the questioned legislation would have been enacted in the absence of a race-based purpose. Cf. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, the majority in *Shaw* concluded from the Court's voting rights and race discrimination precedents that, "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'... demands the same close scrutiny that we give other state laws that classify citizens by race." In *Shaw* the Court also pointed out that *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) supports the position "that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause *regardless of the motivations underlying their adoption.*" *Id.* at 2826 (Emphasis added).

In *Miller* the lower court had found that the legislature's racial purpose was "predominant" and "overriding." Therefore, it was unnecessary for this Court to decide whether a purpose that was less than "predominant" would suffice to establish a *Shaw* claim. Accordingly, the reference in *Miller* to the "predominant" and "overriding" purpose of the Georgia legislature should not be viewed as requiring that a plaintiff satisfy more than the "mixed motives" test for deciding whether racial classifications in redistricting trigger "strict scrutiny." To establish a unique and more demanding test than "mixed motives" would be inconsistent with *Arlington Heights* -- which *Miller* and *Shaw* cite approvingly -- and also with several other well-established precedents applying this test. *See* generally Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 518 (1995). Thus, such an interpretation of *Miller* would violate the teaching of *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2111 (1995), where the Court emphasized the importance of "consistency" in the judicial treatment of governmental racial classifications. However, in the present case, it is immaterial whether less than a "predominant" racial purpose would suffice,

including the candid remarks by Senator Dennis Winner on the floor of the North Carolina Senate -- makes clear the dominant race-based legislative purpose. As in *Miller*, "[b]eyond any question" the state's "dominant concern" in enacting its second redistricting plan was to create two majority-black districts and obtain preclearance from the Justice Department by capitulating to its inappropriate enforcement demands.

The "bizarre appearance" of a redistricting plan may not only be evidentiary of the race-based legislative purpose but also may increase the plan's potential for harm. That appearance will constantly suggest to voters that each legislator has been elected primarily to represent persons of the legislator's own race.[17] Likewise,

---

because *all* the evidence makes it obvious that the "predominant, overriding" purpose of the North Carolina General Assembly was race-based -- to assure the election of two African-Americans to Congress -- and any other purpose was subordinate thereto.

[17]The effect of this suggestion on voters is reflected in the testimony of Plaintiff-appellant Shimm that, as a white voter in the majority-black Twelfth District, he felt that "we are orphans." Shimm Dep. at 12. Furthermore, as the Court pointed out in *Shaw*, including "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls." 113 S.Ct. at 2827. Plaintiff-appellant Shimm also testified that, "even more objectionable, it seems to me, is this notion that blacks only can represent blacks because the corollary of that is if blacks only can represent blacks, then blacks can only represent blacks. And this supplies, I think, a very good basis for anybody who is so inclined to

it sends to elected representatives a message that is "equally pernicious. When a district obviously is created solely to effectuate the perceived common interest of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw,* 113 S.Ct. at 2827.[18]

North Carolina's "bizarre districts detached from meaningful geographic referents" are "transparently racial classifications." O'Rourke, *supra* n. 8 at 772. Therefore they constantly reinforce racial stereotypes and remind voters that race is being used by government as the basis for allocating rights and responsibilities. Cf. *Shaw,* 113 S.Ct. at 2827. These districts "stigmatize individuals by reason of their membership in a racial group and. . . incite racial hostility." *Id.* at 2824. Moreover, when, as in North Carolina, the majority-black districts are created by splitting predominantly white precincts and census blocks

---

say, 'I am not going to vote for a black.' And in the long run, I think it is a far more pernicious consequence." Shimm Dep. p. 60. For a general discussion of "descriptive representation" versus "substantive representation" in Congress, see Carol Swain, Black Faces, Black Interests: The Representation of African-Americans in Congress (1993).

[18]The record in this case makes clear that this is more than a theoretical concern. As Chief Judge Voorhees points out, "Indeed, the testimony of District 12's congressional representative, Mel Watt, speaks for itself. *See,* e.g., Tr. 999-1001 ("representing a district that you are consistent with in your philosophies allows you to be consistent in voting your conscience *without buckling under* or *catering*, as you said my statement said, to other interests that may not predominate in my district [such as the 'business or *white community*']") (emphasis added). App. J.S. 120a, n. 5; 861 F. Supp. at 478, n. 5.

to provide "white corridors" connecting concentrations of blacks, the white "filler people" are rendered less able to participate effectively in the process of electing representatives in Congress. In light of the serious harms threatened by North Carolina's flagrant use of race to classify voters, *no* claimed state interest should be considered "compelling" enough to pass the "strict scrutiny" test.

B. Section 5 of the Voting Rights Act Provides No Justification for this Racial Gerrymander.

Under § 5 of the Voting Rights Act, any "covered" jurisdiction must obtain "preclearance" by the Department of Justice or by the United States District Court of the District of Columbia before any voting standard, practice, or procedure can be altered. To be precleared, "covered" jurisdictions must demonstrate that the intended changes do not have a discriminatory purpose or effect. 42 U.S.C. § 1973c.

Miller has reaffirmed the holding in *Beer v. United States*, 425 U.S. 130, 141 (1976), that the "nonretrogression" principle governs as to the "effects" prong of § 5. Thus, as *Beer* makes clear, a "covered" jurisdiction is not obligated to maximize the political strength of minority voters, but only "to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. If a "covered" jurisdiction proposes a plan that increases the number of majority-minority districts, that plan is "ameliorative" and does not violate the "effects" component of § 5. *See Beer, as reaffirmed* in

Miller, 115 S.Ct. at 2492.

In recent years the Department of Justice has disapproved several "ameliorative" redistricting plans because they did not maximize black voting strength. Apparently the premise for the denials of preclearance was that a State which had not maximized minority voting strength -- as required by the "max-black," "if-you-can-you-must" policy adopted by the Department of Justice -- could not possibly demonstrate that its plan had a nondiscriminatory purpose.[19] In this way the denial could be predicated on the "purpose," rather than the "effects," prong of § 5. Thus, even though Louisiana had lost one of its eight seats in Congress as a result of the 1990 census, the Department of Justice made clear that, unless a second minority-black district were added, preclearance would be denied. *Hays v Louisiana* (hereinafter *Hays*), 839 F.Supp. 1188, 1196-97, n. 21 (W.D.La. 1993) vacated, 114 S. Ct. 2731 (1994). The Department of Justice denied preclearance to Georgia until its redistricting plan finally was revised to increase majority-black seats from one to three -- instead of from one to two, as the State had originally proposed. *Miller,* 115 S.Ct at 2491. Likewise, even though previously North Carolina had no majority-black congressional districts, its first redistricting plan was denied preclearance because it had created only one majority-black district.

In ruling on Louisiana's redistricting plan, a three-

---

[19]This premise is at odds with this Court's precedents that "discriminatory purpose" implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects. *Personnel Administration v. Feeney,* 442 U.S. 256, 279 (1979).

judge district court expressed the view that the Department of Justice policy far exceeded its preclearance authority under § 5 and produced a result that Congress had expressly prohibited. *See Hays,* 839 F.Supp. at 1196-97, n. 21. The three-judge district court which considered the Georgia plan reached a similar conclusion -- which this Court has now affirmed in *Miller*.[20] In rejecting the "maximization policy," the Court noted that it was "inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Voting Rights Act." *Miller,* 115 S.Ct. at 2491. Moreover, by requiring race-based districting, this interpretation of the Act raises "a serious constitutional question," and "brings the Voting Rights Act . . . into tension with the Fourteenth Amendment." *Id.* at 2492-93. Because "there is no indication Congress intended such a far-reaching application of § 5," the Court "reject[ed] the Justice Department's interpretation of the statute and avoid[ed] the constitutional problem that interpretation raises." *Id.* at 2493.

By ruling invalid the "maximization policy" of the Civil Rights Division, the Court removed the basis for the denial of preclearance to the first two Georgia redistricting plans. While acknowledging that the Department of Justice can deny preclearance because a state has failed to establish a nondiscriminatory purpose for its redistricting plan, the Court pointed out in *Miller* that Georgia's Attorney General had "provided a detailed

[20]Other unwarranted attempts by the Civil Rights Division to extend its preclearance authority under § 5 have recently been rebuffed by the United States District Court for the District of Columbia. *See Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994).

explanation for the State's initial decision not to enact the max-black plan." *Id.* at 2492. Thus, it was apparent that the Justice Department had no reason to doubt the State's claimed nondiscriminatory purpose other than Georgia's failure to follow the maximization policy; and its denial of preclearance based on "purpose" was an attempt to achieve indirectly a result which neither Congress nor the Constitution authorized it to achieve directly. *Id.* at 2492-93.

Clearly *Miller* governs the present case. In its original plan, the General Assembly created North Carolina's first majority-black district in modern history. In support of that plan -- for which every African-American legislator had voted -- the leadership of the General Assembly submitted extensive information to the Civil Rights Division. Of special significance is a Memorandum dated October 14, 1991 -- submitted in behalf of Dan Blue, the African-American Speaker of the House; Toby Fitch, an African-American who co-chaired the House Redistricting Committee, and others. Ex. 25. This Memorandum made many arguments on behalf of the redistricting plan -- one of the most persuasive being that if a second majority-black district was created, it would not be "compact" and therefore the voters would not have effective representation. *Id.* at 34, 66.[21]

The Assistant Attorney General's objection letter of December 18, 1991, observes that the State had failed to present an "alternative plan providing for a second majority-minority congressional district," even though the

[21]In footnote 9 of his dissent, Chief Judge Voorhees discusses this Memorandum in some detail. *See* App. J.S. 123a-24a; 861 F.Supp. 480-81.

NAACP and the ACLU had expressed "significant support for a second district." J.A. 152-53. Obviously this letter reflects the "max-black" policy of the Civil Rights Division.

In view of *Miller's* holding that, under similar circumstances, the denial of preclearance to a Georgia redistricting plan did not give rise to a "compelling State interest" within the meaning of the strict scrutiny test, the objection letter of December 18, 1991 provides no justification for North Carolina's racial gerrymandering. Just as in *Miller,* the Justice Department was not free to ignore the State's explanation of its first redistricting plan and arbitrarily equate the failure to maximize majority-black districts to a failure by the State to establish a nondiscriminatory purpose.

In *Shaw* the Court acknowledged that a State has a "very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." 113 S.Ct. at 2830. The corollary of this proposition is that no "interest" exists in complying with federal antidiscrimination laws that are misapplied and misinterpreted. In *Miller* the Court made clear that the "maximization policy" of the Civil Rights Division was a misapplication and misinterpretation of the Voting Rights Act. Therefore it did not give rise to a "compelling interest" for Georgia finally to adopt under Justice Department pressure a redistricting plan which maximized majority-black districts. Likewise, the denial of preclearance under § 5 for North Carolina's first redistricting plan because of the failure to create an additional majority-black district did not give rise to any "compelling interest" in enacting the second redistricting plan.

C. Section 2 of the Voting Rights Act also Provides No Justification for this Racial Gerrymander.

When this case was originally argued before the Court on April 20, 1993, the State's justification centered on § 5. In its version of the "Nuremberg defense," the State maintained that it had not violated Plaintiff-appellants' equal protection rights because the Department of Justice would never have granted preclearance unless the plan had created two majority-black districts.[22]

After losing on appeal in *Shaw*, the State also has attempted to justify the racial gerrymander by invoking a newly-perceived "compelling interest" in compliance with § 2 of the Voting Rights Act. This belated attempt encounters many obstacles. The most serious is that the relevant facts belie the claimed "compelling interest." As Chief Judge Voorhees makes clear in his dissent, "there is absolutely no evidence in the legislative history of Chapter 7 regarding violations of the Voting Rights Act, or the necessity for any remedial action, other than as a response to the Attorney General's objections lodged against the State's initial redistricting proposal." App. J.S. 123a, 861 F.Supp. at 480. Moreover, "no legislative findings were

---

[22]In addition to portions of the argument quoted earlier in this brief, *supra* at 4, the counsel for the state Defendants stated to the Court: "The determining factor in this case is that North Carolina is subject to Section 5 preclearance," Oral Argument at 36, and "Section 2 may, depending on the particular demographics and the situation of the State, require majority-minority districting, *but once again, that's not this case." Id.* at 38 (emphasis added).

ever made during the redistricting process concerning the relevance of the factors set out in *Gingles;* on the contrary, in its submission to the Department of Justice in support of Chapter 601, its original redistricting plan, the State expressly disavowed the importance thereof altogether." *Ibid.*

Despite the argument now being advanced by the State, there is no reason why the General Assembly would have been concerned about the possibility an imagined plaintiff would file an action under § 2. No such action could be successfully maintained unless the three *Gingles* conditions could be satisfied. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Growe v. Emison*, 113 S.Ct. 1075 (1993); *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994). The General Assembly's own filings with the Department of Justice on behalf of the first redistricting plan had demonstrated convincingly that failure to create two majority-black districts could not be the basis for a successful § 2 action because the *Gingles* requirement could not be met.

As is apparent from the facts recited in *Shaw*, 113 S.Ct. at 2820, the black population of North Carolina is too dispersed to allow creation of two "geographically compact" majority-black districts. African-Americans are a majority in only 5 of the State's 100 counties; and of those five counties -- all in eastern North Carolina -- four have a small population and the fifth is only mid-sized. Because the percentage of African-Americans in the voting age population -- 20% -- is less than the percentage in the total population, the task of creating two such districts is even more onerous.

Nevertheless, the majority below recites that "numerous plans presented to the General Assembly had

demonstrated that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." App. J.S. 91a; 861 F.Supp. at 463-64. Judge Phillips cites nine plans in support of this remarkable conclusion. Examination of the maps incorporating each of these plans will make it apparent that none of these plans is "geographically compact" within the customary meaning of that term.[23]

The majority also states that two plans prepared by the Plaintiff-intervenors were "'geographically compact' under any reading of *Gingles.*" App. J.S. 93a; 861 F.Supp. 464-65. This statement is also astounding because the two plans cited -- "Shaw II" and "Shaw III" -- do not create two majority-black districts. Instead, they create a majority-black district -- the "compactness" of which is questionable -- and a plurality-black district in which African-Americans are less than 42 percent of the voting age population.[24] During the four years since the

---

[23]All of these maps as cited by Judge Phillips in the district court are in the record and can be examined by the Court to form its own conclusion as to the likelihood of a successful § 2 action in light of the *Gingles* requirement of a "geographically compact" minority population.

[24]According to the tables which accompany the two plans, Native-Americans -- primarily in Robeson County -- constitute slightly less than 8% of the voting age population. The majority in the Court below uses the term "majority-minority district" to refer to "an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority." App. J.S. at 8a, n. 3; 861 F.Supp. 417, n. 3. Apparently a plurality-black district would not satisfy the "maximization policy" of the Civil Rights Division; nor does the possibility of creating a plurality-black district demonstrate that the first *Gingles* condition could be satisfied

redistricting process began, no one has shown how to draw two "geographically compact" majority-black congressional districts in North Carolina. Cf. Jim Morrill, *The Redistricting Game,* The Charlotte Observer, July 18, 1993, at 1B. The finding to the contrary by the majority in the district court is wishful thinking.[25]

The prospects for imagined plaintiffs successfully to attack the first plan under § 2 would be even dimmer because racial polarization in North Carolina has been reduced by white cross-over voting. J.A. 99-102. Furthermore, "racial appeals" -- with a possible exception in 1990 -- have also become rare in North Carolina.[26]

---

for purposes of a § 2 action.

[25]Indeed, the impracticality of creating more than one geographically compact majority-black district "is perhaps best demonstrated by the existence of District Twelve itself." *See* App. J.S. 128a; 861 F.Supp. at 482 (Voorhees, C.J., dissenting). Plaintiff-appellants question whether even one "geographically compact" district can be created. However, District One under the first redistricting plan was more compact than District One under the second plan -- as even Gerry Cohen acknowledged. Tr. 589.

[26]Prior to 1993, when *Shaw* was decided, white cross-over voting had enabled African-Americans to win election to office even though the constituency was predominantly white. *See Shaw,* 113 S.Ct. at 2831; Stips. 137-43, 145. In 1994, Henry McKoy, a black Republican, defeated a white incumbent to win election to the state Senate from District 14 in Wake County -- which is predominantly white. *See* News & Observer, Raleigh NC, November 9, 1994. Meanwhile, outside North Carolina, Gary Franks and J.C. Watt -- both African Americans -- have been elected to Congress from overwhelmingly white constituencies, and today General Colin Powell, an African-American, is among the most popular individuals in public life.

The purported "compelling interest" of the State in complying with § 2 is especially suspect because it is so enmeshed with the Justice Department's use of an illegal criterion in denying preclearance under § 5. The Defendants have argued that the failure of the State to maximize its majority-black districts justified the Civil Rights Division in denying preclearance because the State had not demonstrated the absence of a discriminatory purpose. Now they argue that the denial of preclearance alerted the General Assembly to the likelihood of a successful action against the State under § 2 if a second majority-black district were not created.

The fallacy of this contention has already been discussed. In the first place, it requires an assumption that the legislature had a purpose which the legislative history clearly shows was absent. Certainly this Court should not accept at face value the State's assertion now of a legislative purpose to comply with § 2, when it is apparent from an examination of the plan and its legislative history that the purpose now being relied on "could not have been a goal for the legislation" in January 1992, when the plan was enacted. Cf. *Weinberger v. Wiesenfeld, supra; Califano v. Goldfarb*, 430 U.S. 199, 209, n. 8 (1977); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 728 (1982); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 495 (1989).

Secondly, even if the denial of preclearance had created alarm on the part of the General Assembly that a successful § 2 action might be maintained, this still would not provide a "strong basis in evidence" that the State had a "compelling interest" in creating two majority-black districts. Because the denial was predicated on an illegal policy of the Civil Rights Division, it was entitled

to no weight in determining the likelihood of a successful § 2 action. To give weight to the denial permits the Civil Rights Division finally to arrive by a tortuous route at the objective which it sought initially to reach under its illegal "maximization policy" for § 5 preclearances.

Furthermore, a denial of preclearance should never be considered to have provided "a strong basis in evidence" for a legislature to conclude that it would be subject to a successful § 2 action. The denial takes place without an administrative hearing; and the burden of proof is on the State to show absence of a nondiscriminatory purpose. On the other hand, in an action under § 2 the plaintiff bears the burden of proof to show that a State has acted with a discriminatory purpose.[27] Indeed, since the General Assembly had readily available under § 5 a judicial remedy to determine whether the denial of preclearance was proper but failed to use this remedy, the denial should not be considered to provide any evidence that the State had acted with a discriminatory purpose in creating only one majority-black district.

In *Shaw,* Justice O'Connor used the term "strong interest" -- rather than "compelling interest" -- in referring to a State's interest in compliance with federal voting rights legislation. This selection of terms was wise, because such an interest is not "compelling" enough to justify inflicting on voters the evils of a flagrant racial gerrymander. Indeed, it would be anomalous to conclude

[27]*New York v. United States*, 874 F. Supp. 394 (D.D.C. 1994) points out major differences between § 5 preclearance and § 2 lawsuits.

that a State's enactment of a redistricting plan susceptible to attack under § 2 provides that State an "interest" in segregating its voters into different districts based on race. Instead the "interest" would be to enact a race-neutral plan that would draw citizens together, rather than "polarize" them racially.

II. The Redistricting Plan, Which Violated Every Customary and Traditional Redistricting Principle, Was Not "Narrowly Tailored."

A. The District Court's "Narrow Tailoring" Analysis Conflates Consideration of the State's "Compelling Interests" With Consideration of the Appropriate Means for Achieving Those Interests.

In applying the "strict scrutiny" test, the majority in the district court considered the issue to be whether North Carolina "had a compelling interest in enacting *any* race-based redistricting plan" -- rather than in "enacting the particular race-based redistricting plan under challenge." App. J.S. 43a-44a; 861 F.Supp. at 437 (emphasis in original).[28] In this way, the burden to be carried by the state was greatly reduced and "narrow tailoring" was virtually eliminated from consideration.[29]

[28]The issue as stated by the majority in the district court implies that if a State has a "compelling interest" in creating one race-based majority-black district, it may create several race-based districts in total disregard of traditional districting principles.

[29]Judge Jones pointed out in *Vera v. Richards* (hereinafter *Vera*), 861 F.Supp. 1304, 1333, n. 40 (S.D.Tex. 1994), prob. juris. noted, 115 S.Ct. 2639 (1995), that if the North Carolina districts can "survive constitutional strict scrutiny, then *Shaw* may be a meaningless

The district court's approach conflates the analysis of ends with the analysis of means. *Cf. Metropolitan Insurance Co. v. Ward*, 470 U.S. 869, 898 (1985) (O'Connor, J. dissenting) (objecting to conflation of the analysis of goals and means to achieve those goals). Strict scrutiny has two components. The first is the examination of whether the State has a sufficiently weighty interest that is being promoted by a challenged classification -- whether it has a "compelling interest." The Court must undertake this substantive evaluation of the importance of the goals being pursued, for race is a suspect basis of decision-making -- whatever race is advantaged or disadvantaged -- and can only be justified in the name of the most compelling governmental goals.

The second component of strict scrutiny focuses on the relationship of the means and ends -- the "fit" between the State's interest in addressing voting rights concerns and the form of the districts that must be "narrowly tailored" to suit them. *See Vera*, 861 F.Supp. at 1344, n. 55. In the context of race-based decision-making, the State must pursue its compelling interest in a way that minimizes the harm from its use of the presumptively unconstitutional criterion of race. Only if a State is unable to meet its goal in a reasonable manner by the use of race-neutral alternatives may it resort to the use of race -- even then, only to the least amount feasible.

As Chief Judge Voorhees makes clear in his dissent, the analysis by the majority in the district court is exactly contrary. App. J.S. 141a-53a; 861 F.Supp. 489-96. The use of majority-black districts becomes an end in itself; and no consideration is given to less race-based

---

exercise."

alternatives. Moreover, *any* two majority-black districts will suffice. "In what can only be described as a legal leap of faith," the majority jumps to the conclusion "that whatever districts [are] actually created to preempt liability under the Voting Rights Act need not reflect or incorporate the specific compact minority populations which would allegedly trigger the § 2 violation." App. J.S. 143a; 861 F.Supp. at 491.[30] Not only does this conclusion appear inconsistent on its face with the term "narrow tailoring," but also it is at odds with *Shaw's* implication that a majority-black district can be created only when the State "employs sound districting principles" and only when the affected racial group's "residential patterns offer the opportunity of creating districts in which they will be in the majority." 113 S. Ct. at 2832.

In excusing the North Carolina plan's total disregard of traditional districting principles, the majority in the court below asserts in an extensive footnote that "objective evidence" reveals -- "perhaps counter-intuitively" -- that "bizarre," "ugly" shapes really make no difference because, in due course, voters will learn who represents them in Congress.[31] This "counter-intuitive" view is at

---

[30]In view of the majority's novel view of compactness and contiguity, a skilled computer operator would be free to create majority-black districts consisting of pockets of African-Americans spread all across North Carolina but linked together by tiny corridors of white "filler people." Far more reasonable is the approach of the *Vera* court which observed that "to be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowance for traditional districting criteria." 861 F.Supp. at 1343. *See also* O'Rourke *supra* n. 8 at 755-58.

[31]App. J.S. 106a, n. 60; 861 F. Supp. at 472, n. 6. This footnote contains no citations; and so it is unclear what "objective

odds with Professor O'Rourke's testimony that Plaintiff-appellants Shaw and Shimm, along with *all* other voters in the Twelfth District, were specially injured by being placed in that district, because its confusing boundaries and its bisecting of several Metropolitan Statistical Areas (MSA's) and several media markets make the district "dysfunctional." Tr. 209, 219-20, 232. This expert opinion was fully corroborated by evidence at trial which made clear that creating "bizarre" districts in defiance of sound districting principles harms effective representation.[32]

The "counter-intuitive" view of the majority below is also contrary to the position taken in the October 14, 1991 Memorandum from the General Assembly to the Department of Justice. There it is stated (Ex. 25 at 34):

---

evidence" the majority had in mind. Plaintiff-appellants submit that any such "evidence" -- as well as common sense -- points in the opposite direction.

[32]For example, according to a poll commissioned by the State defendants and conducted in October and November 1993, only 6% of the voters in the Twelfth District knew that Melvin Watt was their Congressman; another 6% of the voters believed their Congressman was [Senator] Jesse Helms; 8% believed their Congressman was Alex McMillan (who represented the Ninth District), and 12% believed their Congressman was Howard Coble (who represented the Ninth District). Tr. at 841-842, 866-869 (Litchman Test.). The headline "2nd, 12th District lines still unclear for many voters," which appeared in the Durham, North Carolina Herald-Sun on November 9, 1994 (p. A7) attests to the continuing confusion of North Carolina voters about the boundaries of Congressional districts. The confusion is probably increasing, rather than diminishing, because after the 1994 election two Representatives from North Carolina reside outside their districts. Representative Jones of the Third District, resides in Farmville, which is in Representative Eva Clayton's First District; and Sue Myrick who represents the Ninth District resides in Congressman Mel Watt's Twelfth District.

"A district could not be sufficiently compact if it was so spread out that there was no sense of community; that is to say, if its members and its representatives could not effectively stay in touch with each other, or if it was so convoluted there was no sense of continuity -- namely, if its members could not easily tell who actually lived within the district."

Likewise, Judge Edith Jones pointed out in *Vera:*

> Traditional, objective districting criteria are a concomitant part of truly "representative" single member district plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can no longer importune their Congressman and expect their Congressman to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral

> process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries.

861 F.Supp. at 1334-35, n. 43.[33]

Congress has required that representatives be elected from single-member districts. 2 U.S.C. § 2 (c). This requirement makes no sense unless the legislative intent was that the districts be created in accord with traditional districting principles, such as compactness, contiguousness, community of interest, and respect for political subdivisions. If, instead, districts can be such "crazy quilts" that voters do not know who represents them and "representatives" have no idea whom they are "representing," what is the point of having such geographical districts? Indeed, forbidding a State to use rational systems of proportional representation, such as cumulative voting or single transferable voting, is totally illogical if proportional representation may be accomplished by means of computer-generated gerrymanders which violate every rational districting

[33]Judge Jones added: "As the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles." *Id.*

principle.[34]

The majority in the district court sought to salvage the plan by finding that there are "internally homogenous communities of interest" in the two majority-black districts. App. J.S. 109a; 861 F.Supp. at 473. However, the five announced redistricting criteria were never amended by the General Assembly to include "homogeneity" or "commonality of interest." Stip. 43. Furthermore, the entire legislative record -- which was an exhibit at trial -- contains no reference to the "distinctiveness" or "homogeneity" of the voters placed in the two majority-black districts. Tr. at 1028, 1037, 1041, 1046-48 (Pope Test.).

When the second redistricting plan was drawn by use of computer technology, the only data available for use in achieving "homogeneity" were racial data. Therefore, in combining the State's 229,000 census blocks into congressional districts, "homogeneity" could only be sought for by using race as *the* governing criterion. Thus, if the General Assembly did have a goal of "homogeneity," it obviously was relying on the racial stereotype "that members of the same racial group -- regardless of their age, education, economic status, or the community in

[34]The flagrant disregard of districting principles like compactness not only contravenes the intent of 2 U.S.C. § 2(c), but may violate the Equal Protection Clause. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (reapportionment "presented little more than crazy quilts, completely lacking in rationality, *and could be found invalid on that basis alone*") (emphasis added); *Drum v. Seawell*, 250 F.Supp. 922, 925 (M.D.N.C. 1966) (three-judge district court held unconstitutional North Carolina's 1966 political gerrymander of congressional districts and commented that "compactness and contiguity are aspects of practicable equality".)

which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw,* 113 S.Ct. at 2827. Such reliance in redistricting is condemned by *Shaw* and by *Miller*.[35]

B. The Absence of a Meaningful Relation Between the Claimed State Interest and the Redistricting Plan Purportedly Intended to Vindicate That Interest Reveals the Absence of Any "Narrow Tailoring."

In *Richmond v. J. A. Croson,* 488 U.S. 469 (1989), a remedial plan was held invalid because of the lack of relationship between the remedy and the persons who have been burdened by past racial discrimination.[36] Implicit in this case is the principle that there should be some nexus or relationship between the right or interest being vindicated and the relief being granted.[37] Moreover, the Court appears unwilling to provide remedies for generalized past discrimination. Cf. *Freeman v. Pitts,* 503 U.S. 467 (1992).

---

[35]The General Assembly was giving no consideration to any community of interest among whites, but instead was using them as "filler people" to connect black population concentrations and to meet equal population requirements. This disparate treatment of voters based on race also violates the Equal Protection Clause.

[36]The "bizarre appearance" of the North Carolina redistricting plan not only evidences the race-based purpose of the plan but also reveals unmistakably that the plan lacks the close relationship between right and remedy that is necessary for "narrow tailoring".

[37]In a similar manner, the Court has ruled that when property is taken for a public purpose, due process requires "essential nexus," "rough proportionality" and "individualized determinations." *Dolan v City Tigard*, 114 S. Ct. 2309 (1994).

As the plan and its legislative history both reveal, the General Assembly made no effort to relate the relief being granted to any prior deprivation of voting rights. Of the forty North Carolina counties "covered" under § 5, sixteen are outside of either the First or the Twelfth Districts; and only two are even partly included in the Twelfth District. Stips. 108, 110. Of the 553,396 citizens who reside in the Twelfth District, 405,150 -- or approximately 73.4% -- reside in counties which have never been subject to preclearance under § 5. Clearly, there was no lack of "political participation" on the part of the blacks placed in the Twelfth District, for in that district, they constitute 54.71% of the registered voter population, but only 53.34% of the voting age population. In the First District the registration of blacks is 52.41% -- not significantly lower than the 53.40% percent of blacks in the voting age population. Stips. 104, 105. Obviously, the boundaries of the two majority-black districts were not drawn to help compensate for any contemporary obstacles to the registration of black voters.

In North Carolina the registration of black voters is 95% or more Democratic, Tr. 628 (Cohen Test.); Tr. 981 (Watt Test.); Democratic primaries are closed to voters registered as Republicans, Independents or otherwise, Stips. 136, 138; when an African-American runs as a candidate, the vote of blacks for that candidate is very cohesive, Tr. 985 (Watt Test.); and there is substantial white cross-over voting. Despite these favorable conditions for electing Democratic African-American candidates to Congress, the General Assembly made no effort to determine whether alternatives short of creating two "bizarre" majority-black districts might suffice

to elect two African-Americans as representatives.[38] As the dissent of Chief Judge Voorhees makes clear, App. J.S. 141a-42a; 861 F.Supp. at 489-90, the majority in the court below erred by ignoring alternative remedies -- the first of the five factors discussed in its analysis of "narrow tailoring." App. J.S. 57a-77a; 861 F.Supp. at 444-56.

With respect to the second factor, the majority in the district court concluded that the redistricting plan was a "flexible racial goal," rather than a "rigid racial quota." App. J.S. 60a; 861 F.Supp. at 447. This finding is "clearly erroneous" and contradicts both common sense and the plan's legislative history -- including the explicit reference to "quotas" on the Senate floor by Senate Redistricting Chair Dennis Winner. There simply is no evidence that at any time during the General Assembly's consideration of the redistricting plan anyone even remotely suggested that the Representatives elected from the two majority-black districts might not be African-Americans.

The majority below treated the plan as "inherently temporary in nature," because redistricting occurs after each decennial census. App. J.S. 61a; 861 F.Supp. at 447. However, changing to a less race-based plan after the next

---

[38]In order to enhance the election opportunity for minority candidates, the General Assembly changed the election laws in 1989 to dispense with a second primary if the leader in the first primary received more than 40% of the votes cast. Stip. 127; *see* N.C.G.S. § 163-111. Neither the General Assembly nor the majority in the district court below considered what effect this change and other possible race-neutral changes in the election laws might have on the election chances of African-Americans. According to the logic of *Miller*, the legislative disregard of alternative remedies cannot be justified by the unwillingness of the Civil Rights Division to accept as adequate any remedy short of maximization of majority-black districts.

census will be impeded by non-retrogression requirements of the Voting Rights Act and by the probable efforts of the two incumbents from the majority-black districts to keep those districts as intact as possible. If the majority in the district court had been more sensitive to the constitutional harm inflicted by governmental use of racial classifications, they would have viewed less favorably the prospect that this egregious racial gerrymander would continue into the next millennium.[39]

The fifth -- and final -- factor considered by the majority in the district court was "the impact of the program on the rights of innocent third parties." App. J.S. 57a; 861 F.Supp. at 445.[40] In discussing this factor, the majority ignored the constitutional injury that *Shaw* recognized. This error is highlighted by the majority's reference to "five white voters whose voting rights have

---

[39]Objective observers would conclude that the "bizarre" racial gerrymander already has been in effect far too long and that the majority below ignored *Shaw's* teaching when, in January 1994, they denied a motion to enjoin use of the redistricting plan in that year's election. Termination of the racial gerrymander should take place immediately because in a vicious circle it perpetuates "racial polarization" and thereby induces indefinite continuation of the very condition that the redistricting plan purportedly is designed to remedy. Plaintiff-appellants submit that "every moment's continuance" of North Carolina's racial gerrymander "amounts to a flagrant, indefensible, and continuing violation of" the Fourteenth Amendment. Cf. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (Black, J.).

[40]As to the fourth factor, Plaintiff-appellants cannot deny that there is a close relationship between the redistricting plan's "goal" of two black representatives in the Congress and "the percentage of minorities in the relevant pool of eligible candidates." App. J.S. 57a. This is inevitable when, as here, a quota system is created on the basis of minority-percentage of the population.

been in no legally cognizable way harmed by the plan." App. J.S. 115a; 861 F.Supp.476. The basic point made by *Shaw* -- and now reemphasized by *Miller* -- is that a legally cognizable harm *is* suffered by a voter who is placed inside or outside a congressional district because of his or her race.[41] The majority below also disregards the evidence that all voters are harmed by being placed in districts which are "dysfunctional" because of their "bizarre" shape.[42]

Furthermore, attention should be given to the "innocence" of many of the voters who must bear the burden of the North Carolina racial gerrymander. The American population is quite mobile,[43] and many white voters subjected to this burden had no connection whatsoever with any past racial discrimination. For example, Plaintiff-appellant Ruth Shaw was reared in Minnesota among Norwegian-Americans, and Plaintiff-

---

[41]The majority recognizes this harm in its discussion of standing and then strangely forgets it in applying strict scrutiny.

[42]"White voters" in the Twelfth District have been harmed by being placed in a district where their Representative does not favor efforts to form interracial coalitions and expresses publicly his satisfaction at not "having to cater to the business or white community." Tr. 995 (Watt Test.); see also footnote 5 of Chief Judge Voorhees' dissent. App. J.S. 128a. The confidence of his white constituents in this Congressman is also eroded by his comments on national television and at trial that Shaw is based on "racist assumptions." Tr. 995-96 (Watt Test).

[43]According to *Freeman v. Pitts*, 112 S. Ct. 1430, 1447-48 (1992), in 1987-1988, over 40,000,000 Americans -- 17.6% of the total population -- moved households. Over a third of these people moved to a different county and over 6,000,000 to a different state.

appellant Melvin Shimm in New York.[44] Furthermore, some of the supposed beneficiaries of the gerrymander may never have resided in the counties "covered" by § 5 or even resided in North Carolina while there was still any racial discrimination in access to the ballot. Indeed, in view of the mobility of the American population, the very concept of majority-minority districts to make up for past abuses is misguided.

III. The District Court Employed a Faulty Methodology

A. After the Plaintiff-Appellants Proved that the Redistricting Plan was a Racial Gerrymander, the Trial Court Should Have Placed on the Defendants the Burden of Persuasion as to "Compelling State Interest" and "Narrow Tailoring."

The majority in the district court made many clearly erroneous findings. One cause was the misallocation to the Plaintiff-appellants of the burden of persuasion with respect to "compelling state interest" and

---

[44]As to "innocence" of past racial discrimination, it deserves mention that Mrs. Shaw has not hesitated to vote for black candidates against whites; and, "was part of a group that formed a coalition with the black people in Durham." Shaw Dep. at 33-34, 82. Professor Shimm, who was a member of the NAACP in his college days, pointed out eloquently that, as a Jew, he had himself experienced serious discrimination and that most of his family and his wife's had suffered severe persecution during the Holocaust. Shimm Dep. at 54-61.

"narrow tailoring."[45] In placing the burden of persuasion on plaintiffs, the district court relied on the proposition that members of a racial minority challenging a State law or policy on equal protection grounds "bear the ultimate burden of persuasion throughout the proceeding." App. J.S. 42a; 861 F.Supp. at 436."[46] More relevant, however, is the language of opinions which establish that suspect classifications -- such as those involved in a racial gerrymander -- are "presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r. v. Feeney*, 442 U.S. 256, 272 (1979); *see also Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *Bernal v. Fainter*, 467 U.S. 216, 228 (1984).[47]

---

[45]The court below recognized that once the plaintiffs had proven a racial gerrymander, the defendants would have the burden of production as to these issues. General principles of evidence would suggest that the defendants would also bear the burden of persuasion; usually a party bears this burden as to its affirmative allegations and as to the issues on which it must produce evidence. *See* 9 Wigmore, Evidence § 2486 (Chadbourn Rev. 1981); 2 McCormick, Evidence § 337 (4th Ed. 1992). Another reason to place the burden of persuasion on the defendants was because of the invocation of various privileges to prevent the plaintiffs from obtaining evidence about some of the events that preceded the General Assembly's enactment of the racial gerrymander.

[46]The court cites *Batson v. Kentucky*, 476 U.S. 79 (1986) for this proposition. However, the citation seems anomalous in the present context, because *Batson* did not involve the strict scrutiny test and, once a peremptory challenge is proved to be race-based, it cannot be justified by any "compelling state interest."

[47]In *Hunter v. Underwood*, 471 U.S. 222, 225-28 (1985), the Court ruled unanimously that, once the plaintiffs had proved "by a preponderance of the evidence that racial discrimination was a substantial or motivating factor," they would prevail unless the defendants "proved by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered." Cf. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-87 (1977). Such allocations of the burden of persuasion to the defendants are inconsistent with the allocation of that burden to the plaintiffs in this case.

In *Miller* the Court observed that there is "presumptive skepticism" of all racial classifications, 115 at 2491; and so the race-based Georgia districting was "presumptively unconstitutional." Id. at 2493. Similarly, in *Shaw* the Court pointed out that "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." 113 S.Ct. at 2828, quoting *Feeney,* supra. Such language simply cannot be reconciled with placing on the Plaintiff-appellants the burden of persuasion in this case as to the State's claimed "compelling interest" or "narrow tailoring." See also Blumstein, Racial Gerrymandering and Vote Dilution: *Shaw v. Reno* in Doctrinal Context. 26 Rutgers L.J. 518, 589 (1995).

B. The Trial Court Clearly Erred in Relying on Post Hoc Rationalizations and on a Fictitious Version of Legislative Intent.

A second major cause of error by the majority in the district court was their willingness to accept fictitious interpretations of legislative intent -- often on the basis of post hoc rationalizations. For example, in accepting the State's contention that the redistricting plan served the state's "compelling interest" in complying with § 2, the majority in the court below states that the "record as a whole firmly establishes" that, after denial of preclearance

by the Justice Department, the General Assembly "reassessed" its belief that the original plan would not violate the Voting Rights Act. App. J.S. 112a-113a; 861 F. Supp. at 474. However, the legislative record, which is in evidence, reveals no such "reassessment" but only shows the legislators were convinced -- with good reason -- that the Civil Rights Division would not preclear a plan with only one majority-black district. In this instance, as in several others, the majority below relied on assertions of a fictitious legislative intent; but this Court has made clear that legislation must not be upheld on that basis. *Weinberger v. Wiesenfeld*, 420 U.S. 641, 648 (1975).[48]

Plaintiffs moved *in limine* to exclude evidence concerning data that could not have been available to the General Assembly in January 1992, when it enacted the second redistricting plan. By divided vote, the district court denied the motion; and thereafter it made findings on the basis of post hoc rationalizations which relied on demographic data which did not become available until 1993. Consequently these findings are clearly erroneous.[49]

Undoubtedly the willingness of the majority in the district court to accept post hoc rationalizations stemmed from their fervent desire that two African-Americans from North Carolina serve in Congress for the first time since

---

[48]See also *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring in result).

[49]In *Hays*, 839 F.Supp. at 1203, the three-judge district court criticized the post hoc rationalizations with which Louisiana attempted to sustain its redistricting plan and the opinions of Dr. Lichtman, the State's expert in that case. Those criticisms apply directly to North Carolina's use of post hoc rationalizations in this case and to the opinions offered by Dr. Lichtman in this trial.

1901. This end -- however laudable -- does not justify "balkanizing" the State with racial gerrymanders, which aggravate, rather than remedy, "racial polarization." Moreover, their reference to the inability of "any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected," App. J.S. 115a; 861 F.Supp. at 476, is misleading, for it fails to reveal that few blacks have run for Congress or to compare their respective experience and qualifications with the experience, qualifications and incumbency status of their opponents. Certainly the opinion provides no adequate basis for concluding either that African-Americans would never have been elected to Congress heretofore if they had run for office[50] - especially if they had attempted to form biracial coalitions - or that they cannot win today without the aid of majority-black districts.

CONCLUSION

Shaw and *Miller* describe the harm to *all* voters which springs from the misuse of racial classifications and racial stereotypes. The misuse here, as in several other

---

[50]A parallel situation makes clear the danger of inferring too much from incomplete information. Currently females hold far fewer political offices than males. Is this the result of gender discrimination? A recent study by Jody Newman, the executive director of the National Women's Political Caucus, concluded that, although discrimination against female candidates is still an important issue deserving redress, to claim that such discrimination is the primary reason women do not hold the same number of political offices as men ignores a key factor -- namely, a smaller percentage of women run for office than do men. However, when they do run, women win public office to about the same extent as do men. *See* Broder, David, "Key to Women's Political Parity: Running," The Washington-Post, Federal Page, Sept. 17, 1994.

cases, resulted from the misguided and unauthorized policy of the Civil Rights Division -- which sought to exercise powers not granted to it either by Congress or by the Constitution. Once again -- as before in *Shaw* and then in *Miller* -- this Court should express its strong disapproval of race-based laws and racial classifications. "Strict scrutiny" must not become a "paper tiger."

Plaintiff-appellants recognize that the advocates of racial gerrymanders will attempt to evoke fears of judicial entry into a "political thicket."[51] More than three decades ago similar attempts were made when the Court was considering whether to enforce judicially the "one-person, one-vote" principle -- rather than leave its enforcement to the tender mercies of legislatures. Fortunately, the Court moved forward then; and, hopefully, it will not halt now in dismantling racial gerrymanders and racial stereotypes. Therefore, for the reasons stated here and in the discerning dissent of Chief Judge Voorhees, the decision of the district court should be reversed.

Respectfully submitted,

Clifford Dougherty
2000 North 14th Street
Suite 100
Arlington VA 22201

Robinson O. Everett

301 W. Main St., Suite 300
Durham N.C. 27701
(919) 682-5691
Appellant and Counsel of
Record for Appellants.

---

[51]In this vein, the majority in the district court "issue[d] an expression of judicial restraint that is, frankly, hard to swallow." *Vera*, 861 F.Supp. at 1345, n. 55. Federal judges already "are routinely deciding" similar issues "in § 2 vote dilution cases." *Ibid.*